In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1955

LUCIEN V. AMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on 14 counts of willfully and knowingly aiding and assisting in the preparation of false and fraudulent federal income tax returns, in violation of Section 7206(2) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(2). Petitioner was sentenced to a term of three years' imprisonment, all but three months of which was suspended and petitioner was placed on probation for three years. The court of appeals affirmed (Pet. App. A16-A24). Petitioner contends here (1) that the verdict was coerced by the manner in which the jury was polled in open court, (2) that the trial court erred in admitting evidence of other

crimes, and (3) that the trial court committed reversible error in inadvertently instructing the jury that petitioner, rather than the government, made a certain factual contention.

The evidence showed that petitioner, a tax-return preparer, claimed for his clients deductions to which he knew they were not entitled.

1. The court of appeals fully considered and properly rejected petitioner's contention (Pet. 10–13, 19–20) that the verdicts of guilty were coerced by the manner in which the jury was polled in open court (Pet. App. A17–A22; footnotes omitted):

> After deliberating for about an hour and fifteen minutes the jury returned with its verdict finding Amos guilty on all counts. The court then proceeded to poll the jury. The eighth juror polled, Mr. Crockett, stated that he did not join in the verdict of guilty as to all counts. Thereupon the following colloquy occurred:
>
> The COURT. Did you join in the verdict in any of the Counts?
>
> Mr. CROCKETT. Yes, sir.
>
> The COURT. The jury will retire to re-consider its verdicts, then as soon as you have reached unanimous verdicts—return the forms to Mr. Betts [jury foreman], there has been a misunderstanding. As soon as you have reached unanimous agreement, now—Now, Mr. Foreman, in as much as there are fourteen counts if there is unanimous consent on any counts indicate the ones on which it is unanimous because the Court would be inclined to receive that verdict that is unanimous as to a count;

that would leave the jury to consider the ones that are not, am I making myself clear?

Mr. BETTS. Yes, sir.

Since the jury had been instructed that its verdict on any one count should not control the verdict on any other count, Judge Williams proceeded to inquire of juror Crockett whether he agreed with his fellow jurors, who had already responded, on any one count. Crockett indicated his disagreement with his fellow jurors' verdict on all counts except as to a guilty verdict on count four. The judge then questioned the remaining four jurors as to whether each agreed with the guilty verdict on count four. Upon receiving affirmative replies, the court announced that it would receive the verdict only on count four and that it would send the jury back to reconsider the remaining counts. At that point, counsel for Amos requested a further poll relating to count four. Accordingly, the court proceeded to repoll the jury on count four. In responding to the court's further query, juror Crockett said, "I don't think the one that prepared the income tax, the preparer, was guilty."

At this point, the trial judge declined to accept any verdict and in part instructed:

"Ladies and gentlemen of the jury, none of these verdicts will be received. This is not a unanimous verdict and we cannot receive it."

The jury returned after 25 minutes with another guilty verdict. Again the court polled the jury, but this time all 12 agreed with the foreman's pronouncement of guilt. Thereafter the court further inquired of juror Crockett, who responded as follows:

The COURT. Now, since we have had the matter of the identity, Mr. Crockett, are you certain you understand?

Mr. CROCKETT. I am certain I understand.

The COURT. You intend to return a verdict of guilty on each of the fourteen counts?

Mr. CROCKETT. Yes, sir.

The COURT. Mr. King [Amos' attorney], do you desire to address any questions to the members of the jury?

Mr. KING. No, Your Honor.

Amos now asserts that the interrogation in requiring a juror to disclose his vote in open court on each count and in thereafter directing that the jury retire to reconsider its verdict coerced a verdict in violation of Rule 31(d), Fed. R. Crim. P. which, in pertinent part, reads:

"(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

This rule specifically grants the trial judge a measure of discretion in determining either to require the jury to deliberate further or to grant a mistrial if it appears that the verdict was not unanimous. *See United States* v. *Brooks*, 420 F. 2d 1350, 1353 (D.C. Cir. 1969). In this case, Judge Williams directed that the jury retire for further deliberation after learning that juror Crockett did not concur in the finding of guilt on any of the counts. Whether that ruling constitutes error depends on whether

it is likely that the proceedings conducted by the trial court coerced the juror in arriving at his final verdict. *Compare United States* v. *Bendicks,* 449 F. 2d 313, 315 (5th Cir. 1971); *Williams* v. *United States,* 419 F. 2d 740, 744–47 (D.C. Cir. 1969) (en banc); *United States* v. *Brooks, supra* at 1351–54 (verdicts sustained as not coerced), with *United States* v. *Sexton,* 456 F. 2d 961, 964–67 (5th Cir. 1972); *United States* v. *McCoy,* 429 F. 2d 739, 741–742 (D.C. Cir. 1970); *Matthews* v. *United States,* 252 A. 2d 505, 506–507 (D.C. Ct. App. 1969) (verdicts found to be coerced).

We need note a distinction between a case where the trial judge interrogates the jury to clarify the confusion engendered by a juror's response to a poll which is inconsistent with the foreman's announcement of the verdict, as in the present case, and one in which the court requires a jury to reveal its decision when no verdict has been returned, as in *Brasfield* v. *United States,* 272 U.S. 448 (1926). In the latter circumstances, the court's actions will be deemed coercive. But in the former, Rule 31(d) gives the court some latitude in polling of the jury to clear up an apparent confusion. *Williams* v. *United States,* 419 F. 2d at 746.

Moreover, in evaluating the trial court's polling procedure, since the trial judge is present on the scene, we must pay due deference to his views on whether the recalcitrant juror's ultimate acquiescence in the verdict came freely, without pressure from the court. *United States* v. *Brooks,* 420 F. 2d at 1353; *Jackson* v. *United States,* 386 F. 2d 641, 643 (D.C. Cir. 1967).

Applying these principles, we hold that this record demonstrates that Judge Williams interrogated juror Crockett to dispel any confusion. When juror Crockett on the second interrogation, which was requested by Amos' counsel, indicated an apparent change of mind as to guilt on count four, Judge Williams promptly refused to receive the verdict and directed that the jury resume deliberations, adding this comment:

"I hope you are able to arrive at a verdict. If you are well and good, if you are not well and good."

Additionally, after the jury returned its verdict, Judge Williams ascertained from juror Crockett that he understood the import of the verdict and that he agreed with the guilty verdict on all counts.

We think it significant, too, that Amos' attorney voiced no objection to the court's procedures in polling the jury or questioning of juror Crockett. This lack of objection by counsel permits an inference that the procedures utilized did not appear coercive at the time. *See United States* v. *Brooks,* 420 F. 2d at 1353–54.

In denying Amos' post-trial motion to arrest judgment or for a new trial, Judge Williams stated that "the inquiries were essentially neutral and not calculated to affect the juror's judgment." We find no error of law or fact in this determination and, accordingly, affirm this ruling.

Contrary to petitioner's contention (Pet. 19–20), the decision below is not in conflict with the rule in the Fifth Circuit announced in *United States* v. *Sex-*

ton, supra. In *Sexton,* as the district court below explained (Pet. App. A7–A8), the trial court demanded that a juror cast her vote in open court after she had indicated that she had not voted in the jury room; the Fifth Circuit concluded that the trial court, by asking the juror to commit herself for the first time in open court, had deprived her of the opportunity of making an independent judgment in deliberation with the other jurors. In contrast, the trial judge here did not require juror Crockett to commit himself before returning to the jury room for further deliberation. Moreover, the procedure followed here was sanctioned by the Fifth Circuit in *United States* v. *Bendicks, supra,* a case that it cited with approval in *Sexton.*

2. Petitioner contends (Pet. 13–17) that the district court erred in admitting evidence that he had submitted false documents to the Interal Revenue Service in support of falsely claimed deductions. In support of this contention, petitioner points out that the willful submission of false documents is itself an offense under Section 7207 of the Code, and that at least one of the false documents related to a tax return not challenged in his indictment. But the evidence of petitioner's attempts to cover his tracks by submitting false documents showed a course of conduct indicating willfulness and was therefore admissible within the trial judge's discretion. See, *e.g., United States* v. *Fidenzi,* 411 F. 2d 1361 (C.A. 7), certiorari denied, 396 U.S. 929; *United States* v. *Edwards,* 443 F. 2d 1286 (C.A. 8), certiorari denied, 404 U.S. 944.

3. Nor is there any merit in petitioner's final contention (Pet. 17–19), that the trial court committed reversible error in charging the jury as follows (Pet. App. A23–A24):

> Several documents have been offered in this trial which the defendant contends are false and fraudulent. You are instructed that the defendant, Lucien V. Amos, was not charged with the submission of these documents and they are only allowed into this trial for the purpose of showing the defendant's intent at the time he prepared the tax returns which are the subject matter of the indictment.

As petitioner states (Pet. 17), the word "defendant" in the first sentence should have read "government". But both the trial court and the court of appeals agreed that the error was harmless and would not have misled the jurors who, after listening to four days of testimony, would have understood that the government, not petitioner, contended that the documents in question were false and fraudulent; the court of appeals further noted that any "question raised by this minor misstatement was clarified by the balance of the instructions" (Pet. App. A24).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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